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TITLE PAGE

CONSENT AND INFORMATIONAL RESPONSIBILITY

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ABSTRACT

The notion of 'consent' is frequently referred to as 'informed consent' to emphasise the informational component of a valid consent. This article considers aspects of that informational component. One misuse of the language of informed consent will be highlighted. Attention will then be directed to some features of the situation where consent would not have been offered had certain information been disclosed. It will be argued that whether or not such consent is treated as sufficiently informed must, from a moral point of view, take account of four conditions. When these are applied to the operation of consent in relation to criminal responsibility for HIV transmission, the approach in some recent cases is shown to be morally questionable.

MAIN TEXT

INTRODUCTION

Consent can, depending on what you consent to, result in the imposition of new obligations or the release of others from existing obligations. This article is concerned with reliance on consent as a release or protection from obligations; that is to say, with the use of consent as a shield. Its focus is on the informational component of a valid consent and the informational responsibilities of those who consent (hereafter *consent-givers*) and those who seek to rely upon another's consent (hereafter *consent-receivers*). For convenience, consent-receivers will be referred to as 'he' and consent-givers as 'she'. This usage should not be taken to imply gender assumptions, as it is purely a means of avoiding the use of inelegant phrases (eg 'he or she') or labels that are likely to cause confusion (eg use of the same personal pronoun to refer to both parties).

The article has two parts.

Part I briefly addresses a conceptual confusion that occasionally rears its head in commentaries on situations where the relevant available information was disclosed to the consent-giver. This confusion will be examined using an example drawn from the debate on the ethics of face transplantation and, it will be argued, it is a confusion that is not displayed in the key cases on the validity of such consent in English law. This is the shorter of the two parts.

Part II addresses the situation where the consent-receiver seeks to rely on consent that would not have been forthcoming had the consent-giver been aware of information that was not disclosed. It will be argued that whether or not such consent morally ought to be treated as sufficiently informed must take account of four conditions. Those four conditions will be applied to a scenario concerning consent in relation to criminal responsibility for HIV transmission. This scenario is one in which the appeal courts have recently considered the impact of the Sexual Offences Act 2003 and reconsidered the impact of the Offences Against the Person Act 1861.¹⁻³

PART I

The informational component of a valid consent is sometimes inappropriately questioned where the consent-receiver has disclosed the material information that was available and that information is understood by consent-giver. Consider the 2003 working party report of the Royal College of Surgeons, which claimed that the lack of sufficient reliable data on the risks of face transplants meant that 'patients will not be able to choose it in an appropriately informed way'.⁴ This report went on to say that since the risks were uncertain and potentially very high,

obtaining *adequate informed consent* to incurring these physical risks appears impossible. There seems no way of coherently aggregating these risks for the purposes of *informed decision making* in such a way that the duty to respect autonomy overrides the duty to protect patients from unacceptable or unknown levels of potential harm. (My emphasis)⁴

The scientific unknowns are here being presented as preventing consent being sufficiently informed. Why? Why is a patient who has *a clear understanding of the available information relevant to her decision*, including information that reliable risk estimates are not available, not adequately 'informed'? The rhetorical power of the quoted words is parasitic upon a

conceptual conflation, whereby the conditions for a consent being valid (in the sense of being an adequate indication of the consent-giver's will) are confused with the conditions for the justificatory sufficiency of consent. What is really being contested is not whether the consent-giver can exercise her will, but whether that will could be a morally sufficient justification for proceeding. To put it another way, where the consent-giver does not lack the relevant known information, nothing more could have been done to make to the informational component of the consent to that treatment more valid. There can be no violation of the consent-receiver's informational obligations (*whatever they are*) where the consent-receiver has disclosed all material data that could have been disclosed at that time and ensured that it is properly understood.

The conditions for a valid consent need to be kept conceptually distinct from the conditions for the justificatory sufficiency of consent. The key cases on the validity of consent in English law do this. In the face transplant situation, the law will not challenge the informational adequacy of the consent where the consent-giver is broadly aware of the nature of the treatment (as required by the crime of assault and the tort of battery).⁵ Yet, the crimes of assault occasioning either grievous or actual bodily harm can still be committed where the victim has validly consented, if the infliction is considered contrary to public policy.⁶ (The patient's consent to a face transplant could, nonetheless, be relied on where it constitutes 'proper medical treatment' for the patient's condition.)⁶⁻⁷ Thus, the law can be understood as separating questions about the informational requirement of a valid consent from questions over the exculpatory sufficiency of a valid consent.

Part II will examine a situation where the informational component of a valid consent is in issue.

PART II

This article is hereafter only concerned with the situation where the consent-receiver seeks to rely on consent that would not have been given had the consent-giver been aware of information that he did not disclose.

It is generally recognised that decisions on whether or not to treat consent as sufficiently informed have potential benefits *and costs* for both parties. For this reason, we are not morally required to treat the consent as invalid merely because the consent-giver lacked information that would have altered her decision. There is a further consideration that must come into play, namely, the question of who should bear *responsibility* for the consent-giver's lack of that information.⁸ From a moral point of view, the consent-receiver should only be prevented from treating the consent as sufficiently informed if he was responsible for ensuring that she was better informed. The consent-receiver's responsibility will turn on the obligations that he owes to the consent-giver with regard to her informational understanding. These obligations could be both negative (eg duties against intentional deception) and positive (eg duties to inform or disclose known information). If providing the information falls outside of the consent-receiver's obligations, then the consent-giver must rely on her own informational resources and the consent-receiver is surely entitled to claim that the consent was sufficiently informed for him to rely on it as a shield. My concern here is with the consent-receiver's positive duties to inform.

Positive duties

While some moral theories are antagonistic to the idea of positive obligations,⁹ most

recognise at least some duties to assist. If, for example, A sees that B is inadvertently about to step into an uncovered manhole, the vast majority of moral theories would consider A to have a duty to call out a warning to B. The reason that this example is not a hard case is that B has a compelling need for the information, A is aware of that need, A is able to assist without thereby bearing an unreasonable burden, and B is unable to assist herself if unaided (because of her ignorance of the danger). That is to say, there are a number of background conditions that most moral theories will insist on before imposing *prima facie* positive obligations.¹⁰⁻¹² The moral theory that I have defended and applied elsewhere, and will briefly examine below, is no exception.¹³⁻¹⁵ My contention is that there are four background conditions or principles that are relevant to the imposition of duties to assist, *including positive informational duties*.

- (1) *Important interests*: the assistance is required because B's important interests are at stake.
- (2) *Position to assist*: (i) A is able to assist B and (ii) A realises or ought to realise that this assistance is required to protect B's important interests.
- (3) *Reasonable burden*: the assistance does not place an unreasonable burden upon A relative to B's important interests.
- (4) *Self-assistance*: B is not in a position to protect her important interests unaided. In an informational context this requires that B has done all that is reasonable to obtain the information by her own efforts.

The *important interests* condition rests on the need to ensure that the situation is not a trivial one in which the interests at stake could not reasonably require another's assistance to protect or obtain. The *position to assist* condition is an elaboration of the principle that 'ought' implies 'can', where 'can' is taken to encompass both the possible and the reasonably possible. The *reasonable burden* condition ensures that the potential duty-bearer (A) is not required to martyr himself in the interests of another. The *self-assistance* condition ensures that B is not free riding on A's efforts and resources.

I have elsewhere nailed my colours to a particularly controversial mast by offering support for the moral theory of Alan Gewirth. Gewirth argues that all those capable of reflecting upon their chosen purposes (agents) owe both negative and positive rights to other agents.¹³⁻¹⁵ While my claim in this article is that the four conditions outlined above are consistent with the majority of moral theories, including those appealing to intuitionist methodologies such as the notion of reflective equilibrium, further justificatory support can be provided by Gewirth's argument to the Principle of Generic Consistency (PGC), *if it is valid*. Defence of this argument would require an article much longer than this,¹⁵⁻¹⁶ thus, for present purposes it must suffice to say that Gewirth argues that agents deny that they are agents if they do not accept that all agents have negative and positive rights to the 'generic conditions of agency'. These are those conditions that are necessary for an agent to act at all or with general chances of success, and are ranked according to their importance for successful purpose-fulfilment. Thus, according to the 'criterion of degrees of needfulness for

action', 'basic' capacities (ie those need to act at all) and the concomitant basic rights take precedence over 'nonsubtractive' capacities/rights (ie those that are necessary to maintain one's current level of purpose-fulfilment), which in turn take precedence over 'additive' capacities/rights (ie those necessary to increase one's current level of purpose-fulfilment).^{13,17} In addition to requiring that positive rights protect the generic conditions of agency (the relevant *important interests*), those duties are limited by the principle that 'ought implies can' (the *position to assist* condition), and the *reasonable burden* and *self-assistance* conditions can be understood as what I have elsewhere defended as the PGC's 'comparable cost' and 'own unaided effort' provisos.^{14,15,18} Thus, Gewirthians, at least, are required to view the four conditions outlined above as necessary conditions for the existence of any and all positive obligations.

I want to consider the application of these 4 conditions—the important interests, position to assist, reasonable burden, and self-assistance conditions—to a scenario that has raised some controversy in the legal literature.

The HIV transmission scenario

Sexual intercourse is, from the perspective of disease transmission, an inherently risky activity, particularly where barrier protection is not used. Many are, however, willing to run potentially significant risks of infection by sexually transmitted diseases by engaging in sexual intercourse without a condom with persons about whose sexual health they are not fully informed. I wish to focus the discussion by reflecting on a scenario concerning the transmission of HIV. For convenience, I will refer to the consent-giver as 'C' to reflect her status as a potential complainant in a criminal action and potential claimant in a civil action, and the consent-receiver as 'D' to reflect his status as a potential defendant in such actions.

C consents to unprotected sexual intercourse with D, but would not have so done had she known that D was HIV positive. D knew that he was HIV positive. Unfortunately, C is thereby infected with HIV.

If D cannot rely on C's consent to sexual intercourse (or on his belief that she has validly consented), he has raped her. In *R v B*, the Court of Appeal considered an appeal from a conviction for rape where the trial judge had held that the fact that the defendant had not informed the complainant of his HIV status was a matter for the jury to take into account when determining whether she had consented or he had a reasonable belief in her consent.¹ Latham LJ, giving the judgment of the Court quashing the conviction, declared that:

Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act.^{1 (para 17)}

Thus, applied to the scenario above, D can rely on C's consent with regard to a charge of rape, despite the fact that D has not disclosed information that would have led C to refuse consent.

There is a further question of whether D can rely on C's consent to unprotected sexual

intercourse to exculpate himself from any crime relating to the transmission of HIV. In *R v Dica*,² the Court of Appeal ruled that the nineteenth century case of *R v Clarence*¹⁹ was no longer authoritative to the extent that it suggested that consensual sexual intercourse was to be regarded as consent to the risk of a consequent disease. Thus, the crime of recklessly inflicting grievous bodily harm, under s.20 of the Offences Against the Person Act 1861, can be committed where HIV is transmitted by consensual sexual intercourse. The Court of Appeal further ruled that the victim could consent to the risk of transmission of HIV transmission, though it opined that 'it is unlikely that you would consent to a risk of major consequent illness if you were ignorant of it' and 'whether the victim did or did not consent to the risk of a sexually transmitted disease is one of fact, and case specific'.² (para 59)

The meaning of consent in this context was further examined by the Court of Appeal in *R v Konzani*.^{3,20} Giving the judgment of the Court, Judge LJ ruled that the consent-giver has not validly considered unless she has given 'informed consent'.³ (para 43) The Court gave two examples of situations where the defendant was reckless and concealed his condition from the complainant but may nonetheless have received informed consent. The first was where they had developed a sexual relationship while the defendant was in hospital receiving treatment for his condition and the second was where the defendant honestly believed that the information had been told of his condition by a third party. These are examples of disclosure by circumstance or another.

Since the law therefore requires direct or indirect disclosure of D's HIV positive status, D has committed the offence of reckless infliction of grievous bodily harm.

A moral approach

Applying the moral principles outlined, a *prima facie* case can be made for criticising the law's response to the above scenario. I have argued that only if the consent-receiver has failed in his informational responsibilities to the consent-giver, should the consent-giver's lack of the relevant information prevent him from relying on her consent. It follows that, in the above scenario, if D's failure to satisfy his informational responsibilities has led C to consent to sexual intercourse without protection when she would not otherwise have consented to sexual intercourse at all, then he has raped her. It also follows that if D has fulfilled his informational responsibilities, despite his failure to disclose his HIV status, C's lack of this information should not prevent D from relying on her consent with regard to both charges. Let's look at the application of the four conditions to determine whether D has failed in his obligations to C.

The first of these is the *important interests* condition, which requires that the consent-giver's important interests be at stake. Where the consent-giver would not have consented had the relevant information been disclosed, the information is (by definition) needed for the consent to truly reflect the consent-giver's will. In the scenario above, C's interests concern her autonomy with regard to her bodily integrity and exposure to a potentially life-threatening risk. These are undoubtedly important interests.

The second is the *position to assist* condition, which requires that the consent-receiver be able to assist and realise (or ought to realise) that assistance is required to protect the consent-giver's important interests. In situations where the consent-receiver has failed to disclose

information that he possesses, he is (by definition) in a position to be able to assist by providing that information. In this scenario, the question arises as to whether D ought to realise that the assistance—ie disclosing specific information regarding his HIV status—is required to protect C's important interests. There will, of course, be no difficulty if D actually knows that C requires the information. Moreover, given the nature of HIV infection D ought to realise that C is likely to require this information unless there are reasons to indicate otherwise. Examples of such reasons could include knowledge about C (eg that C has HIV herself) or other knowledge that D has or lacks (D might not, for example, be aware of the modes of HIV transmission).

The third is the *reasonable burden* condition, which requires that the assistance (ie disclosure) not place an unreasonable burden upon the consent-receiver relative to the consent-giver's important interests. The burden of disclosure for D could be weighty because it is the type of information that it is difficult to find the right moment to disclose and he is likely to be very reasonably concerned about the repercussions of the information being widely known. Nonetheless, I suggest that the important interests at stake for C are weightier. (Such a judgment does, of course, presuppose criteria for determining and weighing important interests, such as those provided by Gewirth's argument.)

The fourth is the *self assistance* condition, which seeks to prevent the consent-giver free riding on the consent-receiver's efforts when she has not exhausted her own efforts and resources. While D has special knowledge of his status, C is not without some means of helping herself. If she has general knowledge of the risks of contracting HIV (which most educated western people will have), she is alerted to the need to either ask him directly about his HIV status or otherwise protect her important interests by, for example, insisting on the use of a condom. An argument could be made that, if she had not taken these steps, she has thereby failed to use all her own resources before attempting to rely on another to satisfy the defects in her informational field. Such an argument will not fly where there are special circumstances that make her reliance upon D reasonable or even unavoidable. Consider, for example, the situation where C is the long-term partner of D.²¹ She is surely not expected to enquire into his HIV status every time they engage in sexual intercourse on the off-chance that it has changed following an undisclosed affair.

It is this fourth condition that will sometimes mean that D does not, in fact, have an obligation to disclose his HIV status and, in the absence of such an obligation, C's lack of special knowledge should not prevent D from relying on her consent to a charge of rape or reckless transmission of HIV. Where, however, these four conditions are satisfied, since this lack of information should have been rectified by D, he should not be permitted to rely on her consent.

CONCLUSION

In conclusion, I have examined aspects of the informational component of a valid consent by focusing on two scenarios (falling in Parts I and II of this article). In Part II, I raised doubts about the moral defensibility of the law's approach to consent in relation to HIV transmission in the scenario considered. I have argued that the current law does not adequately deal with reliance on apparent consent when this is understood in terms of the consent-receiver's positive duties and the consent-giver's responsibility for her own data acquisition. Instead of being sensitive to such complexities, the law's determination of the respective responsibilities

of C and D for C's informational deficiency unduly favours D in relation to a charge of rape and C in relation to a charge of recklessly inflicting grievous bodily harm.

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